IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

Nos. 79-824, 79-825,
79-826, 79-827

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, INSILCO BROADCASTING CORP., *et al.*, AMERICAN BROADCASTING COMPANIES, INC., *et al.*, NATIONAL ASSOCIATION OF BROADCASTERS, *et al.*,

Petitioners,

v.

WNCN LISTENERS GUILD, *et al.*,

Respondents.

MOTION OF THE WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE*, THE WASHINGTON LEGAL FOUNDATION

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June 5, 1980

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MOTION OF THE WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

Washington Legal Foundation, Inc. moves, pursuant to Supreme Court Rule 42, for leave to file the annexed brief *amicus curiae* in the above-captioned proceedings. Consent to the filing of the brief has been obtained from counsel for petitioners. However, consent has been refused by counsel for respondents.

The Washington Legal Foundation, Inc. (WLF) is a non-profit tax-exempt corporation organized and existing under the laws of the District of Columbia for

the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 80,000 members, contributors and supporters throughout the United States whose interests the Foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulations and constitutional law. WLF seeks to advance the interests of the broadcasting industry and the general public in minimizing government interference with the ability of broadcast licensees to change programming formats. Format changes are expressions of speech which are protected by the First Amendment to the Constitution.

The Washington Legal Foundation can bring to this case a perspective not presently represented which may assist in obtaining full consideration of public interest issues. None of the litigating parties is primarily focusing upon general issues of the proper administrative and constitutional role of the Federal Communications Commission concerning radio format changes. WLF's sole concern in these cases is to support the petitioners' efforts to limit the FCC's involvement with format changes so as to maximize free competition and free enterprise in the electronic media.

The broadcast industry is one of the most powerful and influential economic centers in this country. The programs aired by radio and television affect nearly all of the population. The prospect of increased government regulation of the media, if the Court of Appeals is upheld, poses an alarming threat to First Amendment rights. The loss of a particular radio format may be great for elements of a community. Yet, this does not justify massive federal interference with basic programming

decisions by broadcasters. The public interest requires strict adherence to constitutional principles by agencies of the government.

Accordingly, the Washington Legal Foundation respectfully requests leave to file the annexed brief *amicus curiae*.

Respectfully submitted,

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INTERESTS OF *AMICUS CURIAE*, THE WASHINGTON LEGAL FOUNDATION, INC.

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The broadcast industry is one of the most powerful and influential economic centers in this country. The programs aired by radio and television affect nearly all of the population. The prospect of increased government regulation of the media, if the Court of Appeals is upheld, poses an alarming threat to First Amendment rights. The loss of a particular radio format may be great for elements of a community. Yet, this does not justify massive federal interference with basic programming decisions by broadcasters. The public interest requires strict adherence to constitutional principles by agencies of the government.

STATEMENT OF THE CASE

These consolidated cases revolve around the issue of the authority of the FCC to regulate changes in program format by individual radio station licensees. This issue has led, over the past decade, to divergent viewpoints by the activist United States Court of Appeals for the District of Columbia Circuit and by the Federal Communications Commission.

Format changes are problems which are generally confined to radio.[1] Formats are specialized forms of programming which are adopted by licensees as a means to allure and keep loyal listeners. The success of a radio format will translate into higher advertising rates and station revenues.

Radio formats can be as particular as a licensee desires. A radio station may specialize, for example, in classical or jazz music. Stations often subdivide rock music into numerous sub-categories such as progressive or Top-40, thereby particularizing their listening audiences further. Formats may be informational as well as entertaining, *e.g.* religious, all-news, or all-talk-show programs.[2]

Licensees have traditionally exercised great freedom in format selection and change, both during the three

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[1] Television stations normally have a "general" format with programs appealing to a wide range of audiences. However, there can be exceptions: a Spanish language UHF (Ultra High Frequency) station.

[2] Format specialization is a byproduct of the development of television. Television stations siphoned off most general listening programs and their audiences. Radio licensees responded with narrow formats to appeal to particular segments of the population. *Inquiry and Proposed Rulemaking: Deregulation of Radio*, 44 Fed. Reg. 57,636, 57,646 (1979).

year license period and when licensees are assigned to new owners.[3]

It is this freedom which has been increasingly questioned by the Court of Appeals.[4] That court, in *Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246 (D.C. Cir. 1974), stated that the FCC, before permitting the assignment of a license involving a format change, would have to hold public hearings upon certain conditions.

The FCC, in response, ordered an inquiry into the problem of format change regulation.[5] The Commission promulgated a policy statement, *Changes in the Entertainment Formats of Broadcast Stations*, 60 F.C.C.2d 858 (1976), *reconsideration denied*, 66 F.C.C.2d 78 (1977), which reaffirmed its commitment to let formats change according to marketplace considerations. The Commission cited statutory and constitutional impediments to format regulation as well as impracticality of application of these regulations.

The Commission policy statement was challenged and subsequently overturned by the Court of Appeals on June 29, 1979. Petitions for certiorari were filed in this Court on November 26, 1979. Certiorari was granted by this Court on February 25, 1980.

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[3] E. Routt, J. McGrath, & F. Weiss, the Radio Format Conundrum, p. 1 (1978).

[4] *See Citizens Comm. to Preserve the Voice of Arts in Atlanta v. FCC*, 436 F.2d 263 (D.C. Cir. 1970); *Hartford Communications Comm. v. FCC*, 467 F.2d 408 (D.C. Cir. 1972); *Lakewood Broadcasting Service, Inc. v. FCC*, 478 F.2d 919 (D.C. Cir. 1973); *Citizens Comm. to Keep Progressive Rock v. FCC*, 478 F.2d 926 (D.C. Cir. 1973); *Citizens Comm. to Save WEFM v. FCC*, 506 F.2d 246 (D.C. Cir. 1974).

[5] *Notice of Inquiry, Changes in the Entertainment Formats of Broadcast Stations*, 57 F.C.C.2d 580 (1976).

ARGUMENT

I.

THE COURT OF APPEALS DOES NOT HAVE THE POWER TO SUBSTITUTE ITS OWN JUDGMENT FOR THAT OF THE FEDERAL COMMUNICATIONS COMMISSION WHERE POLICY MATTERS INVOLVING AGENCY EXPERTISE ARE CONCERNED.

The Federal Communications Commission has been charged by Congress to regulate the use of the airwaves by broadcasters. Regulation has been considered necessary due to the nature of the broadcasting medium. The scarcity of allowable frequencies compels government allocation to prevent a "cacaphony of competing voices." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 368, 376 (1969).

As a consequence, some agency intervention in broadcasting matters has occurred with the sanction of the courts. However, regulations concerning public interest obligations of broadcasters, *e.g.*, fairness doctrine, or the political equal time rule, are related to procedural and not contextual requirements. Commission power over substantive content programming has been exerted only to prohibit the broadcast of obscene language; language not protected by the First Amendment. *See FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

The FCC has been understandably reluctant to get itself involved with format regulation. This reluctance is a natural outgrowth of the Commission's over forty-year experience with the workings of the broadcasting industry. After careful consideration, the FCC has determined that "our regulation of entertainment formats as an aspect of the public interest would produce an unnecessary and menacing entanglement in matters

that Congress meant to leave to private discretion." 60 F.C.C.2d at 865.

The Commission emphasizes that:

> Although it is recognized that competition will result in some degree of format duplication, we firmly believe that continued reliance on forces in the marketplace provides a positive benefit to the public by allowing listeners to give some means of expressing "whether their preferences for diversity *within* a given format outweighs the desire for diversity *among different* formats," 60 F.C.C.2d at 863, and also by providing a competitive spur which assures that stations offering popular format types will not become indifferent to the tastes of their listeners.

66 F.C.C.2d at 81.

The business judgment of the licensee is given much deference by the agency and rightfully so.[6] It is this independent decision by the broadcaster to devise a particular format for his station which leads to marketplace diversity. The Commission, charged by Congress to make decisions in the public interest,[7] examines the particular format choice made in a license application or license renewal form and decides its public merit. Agency notification is required only of substantial format changes.[8] *Amicus* urges that this minimal intervention by the FCC be considered sufficient to ensure programming diversity.

In large radio markets, radio stations have "naturally" evolved diverse programming without extended federal involvement. 66 F.C.C.2d at 80. Yet, the Court of Appeals would have the FCC hold hearings if a license assignment would affect diversity. This is in spite of the fact that a diverse market can be very difficult to administer.

The Commission has recognized that enormous difficulties would be encountered in enforcing format regulations. Formal definitions of diversity and of broadcast programming categories would have to be devised. Needless to say, defining a concept as dynamic and changing as "progressive rock" could lead to highly arbitrary and subjective terminology. Formats evolve with time. In order to truly monitor such change would necessitate "a comprehensive, discriminating and continuing state surveillance." *Lemon v. Kurtzman*, 401 U.S. 602, 619-20 (1971). Administrative costs of monitoring or conducting formal change hearings could be significant, both in money and time for all parties involved. 60 F.C.C.2d at 861-65.

Another Commission concern relates to the fact that the Court of Appeals mandates government intervention when a "unique" station format is to be abandoned, 60 F.C.C.2d at 863-64, 873-75. However, guidelines for

[6] *See* Note, *Listeners' Rights: Public Intervention in Radio Format Changes*, 49 St. John's L. Rev. 714, 739 (1975); 53 Tex. L. Rev. 1099, 1100-01 (1975).

[7] Section 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(a), provides:

> (a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

[8] *See* Notes, *Federal Regulation of Radio Broadcasting*, 28 Rutgers L. Rev. 966, 968-69 (1975).

determining a unique programming format, for measuring listener format preferences or for the intensity of those preferences may not be quantifiable. *WNCN Listeners Guild v. FCC*, 610 F.2d 838, 862-64 (D.C. Cir. 1979) (Tamm, C.J., dissenting).

Former FCC Commissioner Glen O. Robinson characterized the difficulty of measuring a unique format:

> What makes one format unique makes all formats unique. If subjectivity is to be an important determinant of what makes a format "unique" (or, in other terms, what makes it a net contributor to diversity), how are we to avoid the fact that even with respect to formats which objectively seem identical, people—radio listeners—can and do make distinctions. . . . Indeed, if people did not distinguish among these stations, there would be no reason for them to co-exist—and little economic likelihood that they would. Questions of pacing and style, the personalities of on-the-air talent (both individually and in combination with one another) all contribute to those fugitive values that radio people call a station's "sound" and that citizens' groups (and, alas, appellate judges) call format. It follows, therefore, that by the subjective standards that the Court seems to embrace, any format is unique; from which it follows, all must be preserved. At that thought the mind swims and the heart sinks.

57 F.C.C.2d at 594-95 (Robinson, concurring opinion) (footnotes omitted).

Notwithstanding the various faults the FCC has noted exist with format regulation, the D.C. Circuit has insisted on the Commission applying format regulation in particular circumstances. The Commission must, according to the court, examine any potential loss of diversity when considering a license assignment. The Commission

substantial number of people voice "significant public grumbling" over the proposed license change. The FCC must decide if an adequate format substitute exists in the licensee's service area (which consists of the licensee's broadcasting home and nearby places regularly served by the station). Finally, the agency must determine if the "endangered" program format is "financially unviable," regardless of station management. If any of the above issues occurs, involving "substantial questions of fact material to the public interest," the FCC must order an evidentiary hearing. The hearing is a prerequisite to the agency assignment decision. *WNCN Listeners Guild v. FCC*, 610 F.2d at 842-43.

Amicus stresses that the FCC's studied decision not to get involved with radio format regulation should not be lightly disregarded by reviewing federal courts. Commission policy decisions or actions by administrative agencies have traditionally been given respect by the courts.

In 1940, Justice Frankfurter warned that:

> [C]ourts are not charged with general guardianship against all potential mischief in the complicated tasks of government. The present case makes timely the reminder that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts. . . ." Congress which creates and sustains these agencies must be trusted to correct whatever defects experience may reveal. Interference by the courts is not conducive to the development of habits of responsibility in administrative agencies.

FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 146 (1940).

Soon after, the Supreme Court confirmed the broad public interest powers of the Commission to regulate radio. However, Commission powers did not extend to selecting license applicants on a capricious basis. *National Broadcasting Co. v. United States*, 319 U.S. 190, 217, 226 (1943).

Courts have found that administrative agencies like the FCC often are more effective at decision-making due to their "specialization, . . . insight gained through experience, and . . . more flexible procedure." *Far East Conference v. United States*, 342 U.S. 570, 575 (1952).[9] A reviewing court does not decide the wisdom of a particular agency action but only if it is arbitrary, capricious or an abuse of administrative discretion.[10] The First Circuit Court of Appeals has acknowledged that:

> We have no license to regulate broadcasting nor to impose our private views of the public welfare. What we must do is determine whether the Commission is acting within its lawful regulatory authority. In so doing, we shall first consider whether the Commission, judged in terms of its own procedures and precedents, past and present, has acted rationally and properly. Thereafter, we shall consider its actions in terms of statutory and constitutional law.

Public Interest Research Group v. FCC, 522 F.2d at 1064.

Amicus urges that judicial restraint be applied concerning the FCC's desire to stay out of format regulation. The Commission has reached its present attitude after years of examining broadcast activities, as well as through regulatory proceedings. Comments from broadcasters, public interest organizations and the general public were solicited and received by the agency as a result of its *Notice of Inquiry*. The Commission compiled a statistical analysis to study problems of format regulation. It therefore is apparent that the agency's opinions are not arbitrary or capricious and should be respected and upheld by the courts.

The D.C. Circuit should not be allowed to substitute its own views for that of the Federal Communications Commission in matters relating to policy-making. The Commission has initiated proceedings towards a general deregulation of radio rules.[11] This would terminate most FCC regulations over the amount of informational and advertising material to be aired by radio licensees. The refusal of the Commission to involve itself with format regulation reflects a deregulatory, pro-marketplace attitude. An adverse decision in this case might well jeopardize radio deregulation.[12]

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[9] *See FCC v. RCA Communications, Inc.*, 346 U.S. 86, 96 (1953,; *Nat'l Ass'n of Independent Television Producers & Distributors*, 516 F.2d 526, 536 (2d Cir. 1975).

[10] *See e.g., In re Permian Basin Area Rate Cases*, 390 U.S. 747, 777 (1968); *Citizens Comm. to Keep Progressive Rock v. FCC*, 478 F.2d at 926; *Lakewood Broadcasting Service Inc. v. FCC*, 478 F.2d at 922; *S. Terminal Corp. v. EPA*, 504 F.2d 646, 655-56 (1st Cir. 1974); *Pub. Interest Research Group v. FCC*, 522 F.2d 1060, 1064 (1st Cir. 1975); *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 246 (2d Cir. 1977); *Vt. Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 549 (1978).

[11] *Inquiry & Proposed Rulemaking: Deregulation of Radio*, 44 Fed. Reg. 57,636 (1979).

[12] Critics of deregulation are aware of this. *Deregulation of Radio; Denying Motion for Extension of Time*, 45 Fed. Reg. 20985 (1980).

must take into its public interest decisions whether a

II.

THE FEDERAL COMMUNICATIONS COMMISSION IS NOT AUTHORIZED, EITHER BY THE CONSTITUTION OR BY STATUTE, TO INVOLVE ITSELF WITH PROGRAM FORMAT CHANGES.

Amicus has previously denoted that the Court of Appeals for the District of Columbia Circuit does not have the ability to "second-guess" Federal Communications Commission decisions which are not arbitrary or unlawful. In addition, even if the FCC enthusiastically supported format regulation, the First Amendment and the Communications Act of 1934 would bar such enforcement.

A. The First Amendment to the United States Constitution forbids government involvement with broadcast format decision-making.

Mandating government intervention in license assignments or renewals when a "unique" programming format is threatened naturally involves the First Amendment to the United States Constitution.[13] The FCC is constitutionally empowered to "impose reasonable restrictions upon the grant of licenses to assure programming designed to meet the needs of the local community." *Henry v. FCC*, 302 F.2d 191, 194 (D.C. Cir. 1962).

However, format regulation would not constitute a "reasonable restriction" upon licensees. The FCC has astutely observed that, in the course of format change proceedings, an entire proposed programming alternation

[13]The First Amendment states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

could be rejected by the Commission. A consequence of this would be ordering the licensee, in order to promote "diversity," to provide a particular format even if it is not what he originally intended. 66 F.C.C.2d at 83. Massive federal intervention in radio operations could well ensue.

Format change regulation could have a "chilling effect" on the broadcast industry. Licensees would be afraid of instituting experimental programming changes for fear of being "locked in" the format by the Commission. Economic considerations would become more important to the broadcaster. He would be more apt to choose programming pleasing to an aural majority of listeners in order to have a firm financial position in case future format changes were to be vetoed by the Commission or challenged in the courts. Format regulation could well infringe upon the broadcaster's editorial judgment and his freedom of speech.[14]

Freedom of speech is a fundamental right guaranteed to Americans through the First Amendment. Justice Brennan has opined that:

> These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963). The Justice has stressed that "[p]recision of regulation must be the touchstone in an area so closely touching

[14]*See* Notes, *Federal Regulation of Radio Broadcasting*, 28 Rutgers L. Rev. 966, 978-79 (1975).

our most precious freedoms." *Id.* at 438. Therefore, the Court should apply the strict scrutiny standard of judicial review to the concept of format change regulation. Unless some compelling governmental interest is involved or the relevant speech not constitutionally protected, any infringing statute or regulation will be invalidated. *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1111 (D.C. Cir. 1978).[15]

Courts have noted that the First Amendment's role in broadcasting is to "preserve an uninhibited marketplace of ideas." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 390; *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). As a result, the FCC cannot "take from the licensee the ultimate control, and the ultimate responsibility as well, for the actual content of particular programs within the broad categories promulgated to serve the public interest." *National Association of Independent Television Producers & Distributors*, 516 F.2d at 538. A broadcaster, then, has the right to seek the assistance of the First Amendment as a defense against government attempts to limit independent decision-making. *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d at 1110. The Supreme Court has declared that the heart of any unconstitutional governmental censorship is "content control." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972). *Amicus* stresses that any format change regulation by the FCC would constitute unlawful content control of licensee programming.

[15] *See also Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963); *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 604 (1967); *United States v. Robel*, 389 U.S. 258, 265 (1967).

Moreover, no lawful rationale for non-application of the First Amendment has been presented in the instant case. The Commission and the Federal Government lack a compelling interest to enforce format regulation. Nor does the nature of the speech concerned in this case, *i.e.*, music and other forms of informational and entertainment programming, fall within non-protected langauge. None of the formats concerned are obscene. The fact that money is expended to finance commercial radio programs, *e.g.*, by advertising, does not eliminate First Amendment guardianship.[16]

Therefore, *Amicus* believes that *any* attempt by the Commission to involve itself with format control, as required by the Court of Appeals, would contravene the First Amendment's freedom of speech guarantee and not be in the public interest.

B. The Communications Act of 1934 forbids government involvement with broadcast format decision-making.

Amicus finds that even if format regulation by the FCC did not offend the First Amendment, it would still violate the Commission's statutory authority, the Communications Act of 1934.

The Supreme Court has observed that the goal of the Act "was to secure the maximum benefits of radio to all the people of the United States." *National Broadcasting Co. v. United States*, 319 U.S. at 217. The Act

[16] The First Amendment protections given commercial speech are enunciated in such cases as: *Buckley v. Valeo*, 424 U.S. 1, 16 (1976); *Va. State Bd. of Pharmacy v. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-62 (1976); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 363-64, *rehearing denied*, 434 U.S. 881 (1977).

established the FCC and gave it significant authority to regulate radio and other communications forms in the public interest.[17] Yet, the Act does not provide for unlimited power. The Commission, for example, is expressly forbidden to engage in censorship.[18]

Amicus suggests that allowing format regulation would permit a form of censorship by the Commission. The FCC, in the name of "diversity," could prohibit a renewing or assigned licensee from broadcasting particular formats. This would interfere with free speech within the meaning of the statute.

The Supreme Court has considered the relationship between government intervention with broadcasting and the Communications Act. Speaking for the Court, Chief Justice Burger has declared:

> Long before the impact and potential of the medium [radio] was realized, Congress opted for a system of private broadcasters licensed and regulated by Government. The legislative history suggests that this choice was influenced not only by traditional attitudes toward private enterprise, but by a desire to maintain for licensees, so far as consistent with necessary regulation, a traditional journalistic role. The historic aversion to censorship led Congress to enact § 326 of the Act. . . . Congress pointedly refrained from divesting broadcasters of their control over the selection of voices;

[17] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 380.

[18] Section 326 of the Act provides that:

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

> § 3(h) of the Act stands as a firm congressional statement that broadcast licensees are not to be treated as common carriers, obliged to accept whatever is tendered by members of the public. Both these provisions clearly manifest the intention of Congress to maintain a substantial measure of journalistic independence for the broadcast licensee.

Columbia Broadcasting System Inc. v. Democratic National Committee, 412 U.S. 94, 116 (1973) (footnote omitted).[19]

Amicus finds that the definition of journalistic independence must surely include judgment over choice of programming formats. This choice is analogous to newspaper editors' decisions as to what features their newspapers will carry and how large they will be. The electronic marketplace is not "fair game" for the Commission or Court of Appeals. In Short, "Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public." *FCC v. Sanders Brothers Radio Station*, 309 U.S. at 475.

[19] Section 3(h) of the Act provides that:

> "Common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

The rejection of broadcasters as common carriers is confirmed in a number of cases, *e.g.*, *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474 (1940); *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

CONCLUSION

The Federal Communications Commission has determined that the agency should not be involved with regulating changes in programming formats by station licensees at either the time for license renewal or when a license is assigned to new owners. This policy has been modified by the United States Court of Appeals for the D.C. Circuit. The court requires agency action, including hearings, if the elimination of a particular format would result in a loss of diversity in a license service area.

The Court of Appeals, however, has neither the expertise nor authority to impose its judgment on format regulation upon the FCC. The Commission's policy findings had a reasonable basis in agency expertise and were not arbitrary or capricious.

Even assuming that the Court of Appeals could mandate Commission format regulation, such regulation would infringe the First Amendment's protection of freedom of speech. It would also violate the Communications Act of 1934's provision against governmental censorship.

Freedom of expression for broadcasters within a competitive electronic marketplace is a goal desired by much of the public, government and broadcasting industry. By reversing the Court of Appeals' decision, this Court is in a position to further diversity of ideas without harmful government interference.

Respectfully submitted,

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